GOVERNMENT OF MALAYSIA

v.

LEE TAIN TSHUNG

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[CIVIL SUIT NO. K1202 OF 1987]
3 MAY 1991

REVENUE LAW: *Assessment to income tax and penalty - Certificate issued under s. 142(1) - Civil proceedings to enter final judgment - Plea that no tax due and payable - Whether fell within "prohibited pleas" - Power of Courts in taxation matters - Income Tax Act 1967, ss. 96, 106(3), 142(1), (2).*

The plaintiffs commenced civil proceedings for a certain sum said to be due from the defendant T as income tax and penalty under the Income Tax Act 1967 (the Act). The plaintiffs filed a summons-in-chambers seeking to enter final judgment under O. 14 Rules of the High Court 1980 on the grounds firstly, that a certificate issued under s. 142(1) is *prima facie* evidence of the amount due and is thereby conclusive for the Court to give judgment and secondly that there was no defence to this suit. T denied that he was indebted to the plaintiffs for the said sum, contending that the alleged tax was charged on capital receipts arising from the realisation of investment in a rubber estate which therefore did not constitute gains or profits from a business and which should not be included as taxable income. T also argued that ss. 103(1) and 106(3) of the Act do not apply to him as he is not objecting to the amount assessed but is merely saying that there is no tax due and payable by him and that his defence does not come within any of the "prohibited pleas" mentioned in s. 106(3) of the Act. Another argument was that s. 142(1) of the Act was inapplicable in a case where the defence is that no tax is due and payable by him.

Counsel for the plaintiff submitted that where civil proceedings are brought by the Government, the Court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

Held:

[1] A proper reading of s. 96 must reasonably mean that immediately upon the issuance of a certificate under s. 142(1), the amount of tax could no longer be questioned.

[2] Under s. 106(3) of the Act, the Court had only one function to perform and that was to give judgment in favour of the Government; s. 106(3) prevented the Court from entertaining the defence put forward by the appellant.

[3] T did not adduce any evidence or proof that the certificate under s. 142(1) was neither genuine nor true.

[Plaintiff's application granted.]

Cases referred to:

Government of Malaysia v. D.C. [1973] 1 MLJ 162
Arumugam Pillai v. Government of Malaysia [1975] 2 MLJ 29
Chong Woo Yit v. Government of Malaysia [1989] 1 CLJ (Rep) 9
Government of Malaysia v. Abdul Rahman [1975] 1 MLJ 276
Sun Man Tobacco Co. Ltd. v. Government of Malaysia [1973] 2 MLJ 163
Comptroller of Income Tax v. A. Co. Ltd. [1966] 2 MLJ 282

Legislation referred to:
Income Tax Act 1967, ss. 96, 99, 103(1), (4), (5A), 106(3), 142(1), (2)
Rules of the High Court 1980, O. 14

For the Plaintiffs - Mohd. Bazain bin Idris, Senior Federal Counsel
For the Defendant - Patricia Hiew (stands in for Lawrence Thien); M/s. Chau & Thien Co.

JUDGMENT

Syed Ahmad Idid JC:

The plaintiffs' claim is for RM592,524.24 due from the defendant as income tax and penalty under Income Tax Act 1967 and the plaintiffs pray for judgment for:

(a) the sum of RM592,524.24;

(b) interest thereon at the rate of 8% per annum from the date of judgment to the date of payment;

(c) costs of this suit;

(d) such further and other reliefs as the Court deems fit.

From the records, this matter has come before the Court on more than three occasions since 1987. The hearing and the written submissions were completed between 28 January 1991 and 4 March 1991.

On 6 May 1988, the plaintiffs filed a summons-in-chambers asking to enter final judgment under O. 14 of the Rules of High Court 1980 on two grounds:

(a) a certificate signed by the Senior Assistant Director of Inland Revenue giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence and authority for the Court to give judgment;

(b) there is no defence to this suit.

On 20 July 1988, Lee Beng Hock of Unit SH.01-24.3 Jabatan Hasil Dalam Negeri explained that the delay in filing of the O. 14 application was due to two reasons:

(a) the statement of defence dated 20 November 1987 filed by the defendant's Counsel raised a number of issues and the plaintiffs' civil suit unit had to refer the matter to the plaintiffs' assessing unit for their opinion and for the purpose of preparing the O. 14 application;

(b) Before the O.14 application could be prepared the officer-in-charge of the civil suit in the plaintiffs' branch in Kota Kinabalu was transferred to Kuala Lumpur and this situation inadvertently led to the misfiling of the defendant's file.

Mr. Lee Beng Hock, an Examiner in the Department of Inland Revenue, signed an affidavit on 9 February 1988 affirming that:

(a) The defendant, Lee Tain Tshung @ Lee Thien Chiung, is justly and truly indebted to the plaintiff in the sum of RM592,524.24 being income tax due for year of assessment 1974, Additional and Increases of Income Tax levied under ss. 103(4) and 103(5A) of the Income Tax Act 1967;

(b) As required by the provisions of s. 96 of the Income Tax Act 1967, the defendant had been notified of the amount of chargeable income, the tax charged thereon, the place at which payment is to be made, the penalty for late payment increases imposed by ss. 103(4) and 103(5A) of the Income Tax Act 1967, and his rights of appeal under s. 99 of the Income Tax Act 1967.

(c) With reference to para. 2(a), (b), (c) and (d) of the statement of defence filed in Court, the income tax for the year of assessment was raised under the provisions of the Income Tax Act 1967. The defendant appealed against the said assessment and his appeal will be dealt with according to s. 99 of the Income Tax Act 1967.

(d) A certificate under s. 142(1) of the Income Tax Act 1967, signed by the Senior Assistant Director for and on behalf of the Director-General of Inland Revenue shall be sufficient evidence and authority for the Court to give judgment for the amount.

Five months later, on 7 July 1988, the defendant filed an affidavit-in-opposition where:

(1) he denied he was indebted to the plaintiffs in the sum of RM592,524.24 being income tax as alleged or at all on the following grounds:

(a) the alleged tax of RM513,008 was purported to be charged on capital receipts of RM600,000.

(b) capital receipts amounting to RM600,000 arising from the realisation of investment in a rubber estate contained in CL2016. District of Kota Kinabalu, to repay loan/ overdraft facilities demanded by Bank Bumiputra Malaysia Berhad does not constitute gains or profits from a business and therefore should not be included as taxable income. CL2016 was charged to Bank Bumiputra Malaysia Berhad for 1/4 million from 13 June 1972 for quarry operation by him under the name and style of The Sun Enterprise.

(c) the realisation of the investment was also for the satisfaction of outstanding amounts demanded by MIDF for a quarry project loan amounting to RM250,000 for which he could not service from income generated by the quarry operation.

(d) at time of disposal of the said CL2016 in 1973 defendant was a civil servant and all details of sale relating to CL2016 was given to a Senior Officer of Income Tax, the late Vivian Thien, who confirmed that the gain was not taxable under any law in force at that time.

(e) the present income tax raised would be tantamount to suggesting that he was trading on land having land as the stock item. This was by no means true as the subsequent sale of another piece of land contained CL2071 in 1978 (which was also charged to Bank Bumiputra Malaysia Berhad for banking facility and which forced him to sell to satisfy the repayment to the said bank) attracted property gains tax which he had paid.

(2) (a) Defendant referred to para. 9 of the affidavit of Lee Beng Hock wherein it was stated that the income tax claimed herein was raised under the provisions of the Income Tax Act 1967. Defendant repeated his earlier defence. (see para. 4(1) above). He also said that income tax could not be raised on “capital receipts” of RM600,000 under the provisions of the Income Tax Act 1967.

(b) Defendant believed that s.103(1) and s. 106(3) of the Income Tax Act 1967 do not apply to his case as there is no tax due and payable by him to the plaintiffs (for the reasons set out in para. (1) above). He further claimed that his defence does not come within any of the "prohibited pleas" mentioned in the said s. 106(3) and he is therefore not precluded from raising his defence in our Court.

(3) Defendant, in referring to para. 10 of the Lee Beng Hock's affidavit, said he believed that s. 142(1) of the Income Tax 1967 has no application in a case where his defence is that there is no tax due and payable by him to the plaintiffs.

At the hearing on 28 January 1991, the learned Senior Federal Counsel cited:

(1) *Chong Woo Yit v. Government of Malaysia* [1989] 1 CLJ (Rep) 9 where the relevant Supreme Court decision hinges on such civil proceedings being brought by the Government. Gunn Chit Tuan SCJ opined that the Court, unlike the Special Commissioners of Income Tax, has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

(2) *Government of Malaysia v. Abdul Rahman* [1975] 1 MLJ 276.

(3) *Sun Man Tobacco Co. Ltd. v. Government of Malaysia* [1973] 2 MLJ 163.

(4) *Comptroller of Income Tax v. A. Co. Ltd.* [1966] 2 MLJ 282.

The learned defence Counsel urged the Court to take note that the operation of s. 106(3) of the 1967 Act would depend on whether the defence raised by a defendant has offended s. 106(3) itself. She claimed that the defendant is not objecting to the amount assessed and the defence raised is therefore not caught by s. 106(3) of the said 1967 Act. The defendant submitted that all the cases cited by the learned Federal Counsel can be distinguished from the present case as the defendant is not objecting to the amount assessed but merely saying that there is no tax due and payable at all by the defendant to the plaintiffs for various reasons and is therefore not caught by s. 106(3). Thus, the defendant should therefore not be precluded from raising his defence in Court.

It is pertinent to note that s. 106(3) as worded did not state that the defendant is precluded from raising a defence at all but s. 106(3) confined itself to certain "pleas" which cannot be raised. The question whether the plaintiffs' argument or the defendant's argument on this point is correct itself raises a triable issue of law. However, under the provisions of s. 103(1) of the Income Tax Act 1967, tax is payable on the service of the notice of assessment, whether or not that person appeals against the said assessment. Further, under s. 106(3) of the Income Tax Act 1967, the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed under appeal or incorrectly increased under ss. 103(4) and 103(5A) of the Income Tax Act 1967.

The plaintiffs here seek to rely on s. 142(1) of the 1967 Act and the learned Federal Counsel cited the case of *Comptroller-General of Income Tax v. C.D. Ltd.* [1967] 1 MLJ 11 at 13 to support the plaintiffs' contention that the certificate issued under s. 142(1) of the said 1967 Act is *prima facie* evidence of the amount due and is thereby conclusive. But the defendant claimed that despite the wording in s.142(1) which stated that the certificate signed by the Director-General:

> shall be sufficient evidence of the amount due and sufficient authority for the Court to give judgment for that amount,

the said certificate is not conclusive. It only precludes a challenge to the said certificate insofar as the existence and the amount of the sum is concerned.

The defendant if allowed to go to trial would further say that since the defendant's defence is that there is no tax due and payable by the defendant to the plaintiffs, the said s. 142(1) has no application here.

Conclusion

I shall deal with the following and rule on each as I go along:

(a) Delay in filing of O. 14 application: The delay of six months is permissible. Cases quoted in Court show that previous Courts have accepted similar grounds but with the advent of modern technology I hope such a large department as the Inland Revenue Department will no longer raise problems of misfiling of files or even of having to take long periods of time to refer to special units.

(b) Section 96 of the Income Tax Act 1967: The case of the *Government of Malaysia v. D.C.* [1973] 1 MLJ 162 is relevant where it was held that such is:

> sufficient authority for the Court to give judgment for that amount.

A proper reading of this section must reasonably mean that immediately upon the issuance of the certificate, the amount of tax due could no longer be questioned.

(c) Section 106(3) Income Tax Act 1967: Although defendant believed that this section cannot apply to his case, by *Arumugam Pillai v. Government of Malaysia* [1975] 2 MLJ 29, the Federal Court held that by reason of the operation of s. 106(3) of the Income Tax Act 1967.

> the Court, to put it bluntly, had only one function to perform and that was to give judgment in favour of the Government" - per Gill CJ (Malaya).

This case also held that:

> the learned Judge did not err in law in holding that s. 106(3) of the Income Tax Act 1967 prevented him from entertaining the defence put up by the appellant;

(d) Certificate issued under s. 142(1) of the Income Tax Act 1967: The defendant, if allowed to go to trial, would argue that the presumption under s. 142(1) must be read together with s. 142(2) which says:

> (2) In criminal or civil proceedings under this Act any statement purporting to be signed by the Director-General or any authorised office which forms part of or is annexed to the information, complaint or statement of claim, shall, until the contrary is proved, be evidence of any fact stated therein.

Learned Counsel further stated that the phrase "until the contrary is proved" shows that the presumption raised under s. 142(1) is rebuttable and no evidence presented is conclusive and therefore the conclusiveness of the said certificate must come from evidence and proof and not just mere assertion. But the defendant has not provided any proof that the certificate is neither genuine nor true.

(e) The Act deals with taxes: But what this Court has to deal with is that the Act deals with taxes and this must be accepted as a legislative machinery for the speedy collection, recovery and repayment of tax. It is also an answer to the delaying tactics of tax-payers in lodging objections and appeals.

(f) On the basis of facts and principles, the plaintiffs' application is adequately made out. Mr. Lee Beng Hock (see para. 3(b)) stated on 9 February 1988 that the "defendant's appeal will be dealt with according to s. 99 of the Income Tax Act 1967". This was about three years ago. The speed at which appeals are disposed of by the Inland Revenue Department depends on the administrative machinery and efficiency obtaining at the time.

(g) Subject to the Inland Revenue Department fulfilling the undertaking as given by Mr. Lee Beng Hock at (f) above, the Court grants an order-in-terms of plaintiffs' application.

Also found at [1991] 2 CLJ 1520